

No. 12,455

IN THE

United States Court of Appeals

For the Ninth Circuit

---

JIM YUEN JUNG,

*Appellant,*

VS.

BRUCE G. BARBER, District Director  
for the Immigration and Naturali-  
zation Service, San Francisco,

*Appellee.*

APPELLANT'S REPLY BRIEF.

---

JACKSON & HERTOGS,

JOSEPH S. HERTOGS,

580 Washington Street, San Francisco 11, California,

*Attorneys for Appellants.*

**FILED**

APR 19 1950

**PAUL P. O'BRIEN,**

**CLERK**

PERNAU-WALSH PRINTING CO., SAN FRANCISCO



## Table of Authorities Cited

Cases	Pages
Application of Levis, 46 F. Supp. 527 .....	2
Application of Murra, 178 F. (2d) 670 .....	2
Application of Vilorio, 84 F. Supp. 584 .....	3
Application of Wiebe, 82 F. Supp. 130 .....	2
Bonham v. Chi Yan Chain Louie, 166 F. (2d) 15.....	6, 7
Carmichael v. Wong Choon Hoi, 164 F. (2d) 696.....	6
Daniels v. Goldberg, 8 F.R.D. 580.....	6
Ex parte Fillibertie, 62 F. Supp. 744 .....	2
Ex parte Mohriez, 54 F. Supp. 941 .....	2
In re Aldecao, 22 F. Supp. 659 .....	2
In re Appugliese, 58 F. Supp. 829 .....	2
In re De Mayo, 26 F. Supp. 996 .....	2
In re Falek, 24 F. Supp. 672 .....	3
In re Fong Chew Chung, 149 F. (2d) 904.....	2
In re Jaw Gin, 175 F. (2d) 299.....	2
In re Kontos, 12 F. (2d) 134 .....	2
In re Molsen, 84 F. Supp. 515 .....	3
In re Oppenheimer, 61 F. Supp. 403 .....	2
In re Paoli, 49 F. Supp. 128 .....	2
In re Patience, 14 F. (2d) 624 .....	2
In re Prime, 40 F. (2d) 972 .....	2
In re Rosenbleeth, 38 F. Supp. 383 .....	2
In re Sandstrom, 14 F. (2d) 675 .....	3
In re Sawyer, 59 F. Supp. 428 .....	2
In re Taran, 52 F. Supp. 535 .....	2
In re Urmeneta, 42 F. Supp. 138 .....	3
Maloney, et al. v. Spencer, 170 F. (2d) 231.....	3
Martin Ludwig Cohnstaedt, petitioner v. Immigration and Naturalization Service of the United States Department of Justice, certiorari granted December 5, 1949, 70 S. Ct. 240, judgment reversed, per curiam opinion dated Febru- ary 20, 1950, 70 S. Ct. 582, 94 L. Ed. 429.....	3
McCulloch v. Schafer, 100 F. (2d) 939.....	4

	Pages
Petition of Gani, 86 F. Supp. 683 .....	2
Petition of Huseh, 50 F. Supp. 538 .....	2
Petition of Kaudadias, 177 F. (2d) 497 .....	2
Petition of Kohl, 146 F. (2d) 347 .....	2
Petition of Ledo, 67 F. Supp. 917 .....	2
Petition of Ludecke, 31 F. Supp. 521 .....	2
Petition of Peterson, 33 F. Supp. 615 .....	3
Petition of Reginelli, 86 F. Supp. 599.....	2
Petition of Rudder, 159 F. (2d) 695 .....	2
Petition of Taffel, 49 F. Supp. 109 .....	2
Petition of Zaoral, 34 F. Supp. 930 .....	2
Petition of Zogbaum, 32 F. (2d) 911 .....	2
Tutun v. U. S., 270 U. S. 568, 46 S. Ct. 425, 70 L. Ed. 738	1
U. S. v. Golden, 34 F. (2d) 367.....	7
Walleck v. Hudspeth, 128 F. (2d) 343 .....	6

### Constitutions

United States Constitution, Article I, Section 8(4).....	2
--	---

### Statutes

Nationality Act of 1940, Section 334(d), 8 U.S.C.A. 734(d)	1
Reorganization Plan V of June 4, 1940, 54 Stat. 1238, 5 U.S.C. 133t .....	7

### Rules

Federal Rules of Civil Procedure, Rule 73.....	3, 5, 6
--	---------

### Texts

4 C. J. S. 876 .....	5
4 C. J. S. 1086 .....	8
8 C.F.R., Part 60.1 .....	7
8 C.F.R., Part 90.1 .....	7

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

JIM YUEN JUNG,

*Appellant,*

vs.

BRUCE G. BARBER, District Director  
for the Immigration and Naturali-  
zation Service, San Francisco,

*Appellee.*

---

**APPELLANT'S REPLY BRIEF.**

---

The appellee seeks to have this appeal dismissed on the ground that the proper party defendant has not been named (Appellee's Brief, p. 3).

This case is an *ex parte* action in which the United States is a proper, and always a possible adverse party. *Tutun v. U. S.*, 270 U.S. 568, 46 S. Ct. 425, 70 L.Ed. 738. It is equally true that the government is a proper but not an indispensable party litigant.<sup>1</sup>

---

<sup>1</sup>Section 334(d) of the Nationality Act of 1940, 8 U.S.C.A. 734(d), provides:

"The United States shall have the right to appear before any court in any naturalization proceeding for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

Congress, pursuant to the provisions of Article I, Section 8(4) of the Constitution of the United States, entrusted to certain courts the power to entertain and determine naturalization. Yet, at no time has Congress seen fit to enact legislation that would make the United States an indispensable party to any or all petitions.

A majority of the Federal Courts have considered petitions for naturalization where the cases were captioned as *ex parte* actions without naming the United States as a defendant.<sup>2</sup> The United States

---

<sup>2</sup>C.C.A., 2 Cir., *Petition of Rudder*, 159 F. 2d 695;  
 C.C.A., 2 Cir., *Petition of Kohl*, 146 F. 2d 347;  
 C.C.A., 7 Cir., *Application of Murra*, 178 F. 2d 670;  
 C.C.A., 7 Cir., *Petition of Kudadias*, 177 F. 2d 497;  
 C.C.A., 7 Cir., *In re Jaw Gin*, 175 F. 2d 299;  
 C.C.A., 9 Cir., *In re Fong Chew Chung*, 149 F. 2d 904;  
 D.C. Ala. *In re Kontos*, 12 F. 2d 134;  
 D.C. Cal. *In re Paoli*, 49 F. Supp. 128;  
 D.C. Del. *In re Sawyer*, 59 F. Supp. 428;  
 D.C. Fla. *In re Patience*, 14 F. 2d 624;  
 D.C. Ga. *In re Rosenbleeth*, 38 F. Supp. 383;  
 D.C. Idaho *In re Aldecao*, 22 F. Supp. 659;  
 D.C. Ill. *Petition of Zaoral*, 34 F. Supp. 930;  
 D.C. La. *Petition of Gani*, 86 F. Supp. 683;  
 D.C. Md. *Application of Levis*, 46 F. Supp. 527;  
 D.C. Mass. *Ex parte Mohriez*, 54 F. Supp. 941;  
 D.C. Mich. *Petition of Ludecke*, 31 F. Supp. 521;  
 D.C. Minn. *In re Taran*, 52 F. Supp. 535;  
 D.C. Mo. *In re De Mayo*, 26 F. Supp. 996;  
 D.C. Mont. *In re Primc*, 40 F. 2d 972;  
 D.C. Neb. *Application of Wiebe*, 82 F. Supp. 130;  
 D.C. N.J. *Petition of Reginelli*, 86 F. Supp. 599;  
 D.C. N.Y. *Petition of Taffel*, 49 F. Supp. 109;  
 D.C. Ohio *In re Appugliese*, 58 F. Supp. 829;  
 D.C. Ore. *In re Oppenheimer*, 61 F. Supp. 403;  
 D.C. Pa. *Petition of Husch*, 50 F. Supp. 538;  
 D.C. R.I. *Petition of Ledo*, 67 F. Supp. 917;  
 D.C. S.C. *Ex parte Fillibertie*, 62 F. Supp. 744;  
 D.C. S.D. *Petition of Zogbaum*, 32 F. 2d 911;



Supreme Court very recently considered a case, involving a petition for naturalization, wherein the Immigration and Naturalization Service was named as party defendant. (See *Martin Ludwig Cohnstaedt, petitioner v. Immigration and Naturalization Service of the United States Department of Justice*. Petition for certiorari granted December 5, 1949. 70 S. Ct. 240. Judgment reversed, per curiam opinion dated February 20, 1950, 70 S.Ct. 582, 94 L.Ed. 429).

Rule 73 of the Federal Rules of Civil Procedure sets forth the prescribed manner in which appeals to the Court of Appeals shall be taken. It provides that a notice of appeal shall specify the parties taking the appeal, the court to which the appeal is taken, and the procedure of filing such notice with the clerk of the district court. In the case of *Maloney, et al v. Spencer*, 170 F. (2d) 231, 232, this court stated:

“The administratrix has filed a suggestion of death in this court and, appearing specially, has moved to dismiss the appeal on the ground that at the time of filing the notice of appeal, no substitution of the administratrix had been made; therefore, there being no party against whom notice of appeal could operate no jurisdiction was conferred upon this court to entertain the appeal. We do not agree. We think the notice of appeal in and of itself, when filed in time, per-

---

D.C. Tex.	<i>In re Molsen</i> , 84 F. Supp. 515;
D.C. Va.	<i>In re Sandstrom</i> , 14 F. 2d 675;
D.C. Wash.	<i>Petition of Peterson</i> , 33 F. Supp. 615;
D.C. Wisc.	<i>In re Urmeneta</i> , 42 F. Supp. 138;
D.C. D.C.	<i>In re Falck</i> , 24 F. Supp. 672;
D.C. Hawaii	<i>Application of Viloría</i> , 84 F. Supp. 584.

forms the function of transferring jurisdiction of the cause from the trial to the appellate court without regard to existing or probable future appellees. To acquire jurisdiction of the parties substitution is necessary.

“Rule 73(a) of Federal Rules of Civil Procedure, 28 U.S.C.A., provides that an appeal is taken by filing with the district court a notice of appeal. Rule 73(b) provides that the notice shall specify the parties taking the appeal, shall designate the judgment or parts thereof appealed from, and shall name the court to which an appeal is taken. *Nothing is said concerning the naming of the adverse parties.* \* \* \*

*“The jurisdictional feature, insofar as the appeal is concerned, seems to be that the motion of appeal should have been filed within the time limited.”* (Italics ours.)

Prior to adoption of the new Federal Rules of Civil Procedure the same opinion was expressed in the case of *McCulloch v. Schafer*, 100 F. (2d) 939, 940, wherein the court stated:

“A citation to the appellate court is not jurisdictional of the cause. Its purpose is to give notice to the appellee that an appeal will be prosecuted so that he may appear if he so desires. *Sutherland v. Pearce*, 9 Cir., 186 F. 783; *The Framington Court*, 5 Cir., 69 F. (2d) 300; *U.S. v. Hairston*, 8 Cir., 55 F. (2d) 825. The Circuit Court of Appeals for the Eighth Circuit states in the latter case: ‘While the rule is made with the expectation that it will be obeyed, its violation does not destroy jurisdiction of this court.’ See also *Robertson v. Morganton Hosiery Co.*, 4 Cir.,



95 F. (2d) 780; *Weinstock v. Black Diamond S. S. Corp.*, 2 Cir., 31 F. (2d) 519. We therefore hold that dismissal of the appeal is not mandatory because of failure of appellant to serve citation, although certainly orderly procedure would dictate that the rules be strictly followed. \* \* \* we are of the opinion that he had received adequate notice of the appeal, and that the court was not deprived of jurisdiction by appellant's failure to serve formal notice upon him."

Adoption of the new rules of Federal Civil Procedure eliminated the process of citation and provided in lieu thereof that the clerk of court would notify all of the adverse parties. A review of the record in this case will show that the United States Attorney, the designated representative of the United States of America, was appropriately advised of all of the proceedings in this matter.

Under date of December 7, 1949, this appellant filed with the Clerk of the United States District Court for the Northern District of California, Southern Division, a timely notice of appeal as required under the provisions of Rule 73. The caption on this notice of appeal and all other papers filed with the clerk of court prior to the printing of the "Transcript of Record" are entitled: In the Matter of the Petition of Jim Yuen Jung for Naturalization. The courts have often followed the rule that mere clerical errors in describing the parties to an appeal or a writ of error, which cannot mislead, are not sufficient cause for dismissal. 4 C.J.S. 876.

The decisions of this court in the cases of *Bonham v. Chi Yan Chain Louie*, 166 F. (2d) 15, and *Carmichael v. Wong Choon Hoi*, 164 F. (2d) 696, both of which are relied upon by appellee as supporting his view are not in point with the facts in the instant case. In these cases, District Directors of the Immigration and Naturalization Service, both of whom were strangers to the proceedings in the lower court, attempted to insert themselves as appellants to the cause of action.

In the case at bar the appellant was the sole moving party in the lower court. Under Rule 73, an appeal is perfected by filing a proper notice of appeal, and the filing of that notice vests jurisdiction of the case in the appellate court. See *Daniels v. Goldberg*, 8 F.R.D. 580; *Walleck v. Hudspeth*, 128 F. (2d) 343, 344.

It is now asserted that the United States is and wants to be a party litigant to this appeal. It is conceded that such right is vested by statute and that the United States Attorney is the proper party to make such a motion. However, it is asserted that all rights of this appellant have been saved by strict compliance with all laws, rules, and regulations governing this matter.

The rights of the United States have in no way been prejudiced by the service of the notice of appeal on the District Director of the Immigration and Naturalization Service. Matter of fact, the contrary is true. The District Director of the Immigration and Naturalization Service is the proper delegated

agent of the United States to protect the enforcement of the naturalization statutes.<sup>3</sup> It was his duty to see that the interests of the United States were protected.

This court referred in the case of *Bonham v. Chi Yan Chain Louie*, supra, to the: “\* \* \* duty of the administrator to cause the United States ‘to appear’ and become the party litigant.” A decision of the Court of Appeals for the Tenth Circuit appears to be in accord. In *U. S. v. Golden*, 34 F. (2d) 367, 376, that court stated:

“The United States, and not the Director, is a party to the contracts; the United States is the principal, the Director the agent; when the principal is rightfully in court, there is no need to bring in the agent. Besides, in an action where the agent of the government is a party, the courts look through the nominal party and treat the case as one in fact against the government. *State*

---

<sup>3</sup>Reorganization Plan V of June 4, 1940, 54 Stat. 1238, 5 U.S.C. 133t, delegates administration of the naturalization laws to the Attorney General of the United States. Part 90.1 of Title 8, C.F.R. provides:

“Under the general direction of the Attorney General, the Commissioner of Immigration and Naturalization (hereinafter called Commissioner) shall supervise and direct the administration of the Immigration and Naturalization Service and, subject to the limitations of other provisions of this Part, shall have authority to exercise all powers of the Attorney General relating to the administration of the immigration, nationality, and all other laws administered by the Service and shall designate such officers of the Service as he may select, with the approval of the Attorney General, to exercise any power or authority of the Attorney General in the administration of any designated specific provision of such laws.”

Under Part 60.1 of the same title administration and enforcement of the immigration, nationality and other laws administered by the Service were delegated to the local District Directors of the Service.

*Highway Commission of Wyoming v. Utah Construction Co.*, 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262; *Schroeder v. Davis*, 32 F. (2d) 455 (8 C.C.A.); *Kansas v. U.S.*, 204 U.S. 331, 27 S.Ct. 388, 51 L.Ed. 510.”

In addition it may be stated that the rule is that a general appearance in an appellate court implies submission of the party to the jurisdiction of that court. Filing of a brief on the merits, or acceptance of service of the designation by appellant of parts to be incorporated on appeal, or acceptance of appellant's brief, operate as a waiver of process or notice. 4 C.J.S. 1086.

It is contended that if there was heretofore any lack of notice, which we deny, then the conduct of the appellee is in itself sufficient waiver to give this court jurisdiction of the United States as a party defendant.

It is appellant's contention that notice served upon Bruce G. Barber, as District Director of the Immigration and Naturalization Service, and as an agent of the United States, is service upon the United States. We agree with the contention of the government that Bruce G. Barber is not as an individual the proper party defendant. A review of the pleadings will show that the appellant has never considered him as such and that his name appears only through mistake and inadvertence for which neither appellant nor his counsel is responsible. It is submitted that the case should be properly entitled: "Petition of Jim Yuen Jung."

Wherefore, appellant prays that this court consider the appeal on the merits and that an appropriate order issue designating the title of the action.

Dated, San Francisco, California,

April 14, 1950.

Respectfully submitted,

JACKSON & HERTOGS,

By JOSEPH S. HERTOGS,

*Attorneys for Appellants.*